No. 96-451

(3)

Supreme Court, U.S.
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In The

SUPREME COURT of the United States

October Term, 1996

NORTH MICHIGAN LAND & OIL CORPORATION; NIELSON ENTERPRISES CORPORATION; NIELSON ENTERPRISES, a Limited Partnership; NORTH MICHIGAN GAS & OIL, a Limited Partnership; DAVID E. NIELSON; DALE M. NIELSON; GERALD J. TALBOT; and CMK ENTERPRISES, INC.,

Petitioners,

vs.

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS POWER COMPANY, and FRANK J. KELLY, as Attorney General for the State of Michigan.

Respondents.

On Petition For Writ Of Certiorari
To The Michigan Supreme Court

PETITIONERS' REPLY BRIEF

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11 pp

QUESTION PRESENTED FOR REVIEW

Whether Respondent, the Michigan Public Service Commission ("MPSC"), and the Michigan Court of Appeals, erred in determining that granting the relief requested by Respondent, Consumers Power Company ("Consumers") in MPSC Case No. U-10029 would not violate the constitutional rights of Appellants and that Section 10 of 1929 PA 9 ("Act 9") [MCLA §483.110; MSA §22.1320] is not unconstitutional, either on its face or as applied by the MPSC and Michigan Court of Appeals.

PARTIES TO THE PROCEEDING

The caption of the case contained on the cover sheet to this Reply Brief contains the name of all parties to the proceedings in this Court. There are no parent companies or non-wholly owned subsidiaries of corporate Petitioners, North Michigan Land & Oil Corporation, Nielson Enterprises Corporation, or CMK Enterprises, Inc.

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PETITIONER' REPLY BRIEF

North Michigan Land & Oil Corporation, et al. filed a Petition For Writ Of Certiorari to review the Order of the Michigan Supreme Court denying Petitioners' Application For Leave To Appeal from an Opinion of the Michigan Court of Appeals and an Opinion and Order of the MPSC, which are contained verbatim as Appendix "A", "B" and "C" in the Appendix to the Petition For Writ Of Certiorari.

OPINIONS BELOW

The Order of the Michigan Supreme Court (Appendix "A" to Petition For Writ Of Certiorari) is unreported. The Opinion of the Michigan Court of Appeals (Appendix "B" to Petition For Writ Of Certiorari) is reported at 211 Mich App 424; 536 NW 2d 259 (1995). The Opinion and Order of the MPSC (Appendix "C" to Petition For Writ Of Certiorari) is unreported.

STATEMENT OF JURISDICTION

The Order of the Michigan Supreme Court (Appendix "A" to Petition For Writ Of Certiorari) was entered on June 28, 1996.

The jurisdiction of this Court is invoked pursuant to 28 USC §1257(a). That statutory provision was set forth verbatim in Appendix "D" to the previously filed Petition For Writ Of Certiorari.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, RULES AND REGULATIONS INVOLVED.

U.S. Constitution, Fourteenth Amendment, Section 1 (Appendix "E" to Petition For Writ Of Certiorari); 28 USC §1257(a) (Appendix "B" to Petition For Writ Of Certiorari); 1929 PA 9 ("Act 9") [MCLA §483.101, et seq.; MSA §22.1311, et seq.] (Appendix "F" to Petition For Writ Of Certiorari); and SCR 10(c) (Appendix "G" to Petition For Writ Of Certiorari).

STATEMENT OF THE CASE

The Statement of the Case set forth at pages 2 through 11 of the Petition For Writ Of Certiorari is incorporated herein by reference.

REASONS FOR GRANTING THE WRIT

The reasons for granting the Writ Of Certiorari are set forth at pages 11-25 of the Petition For Writ Of Certiorari, and are incorporated herein by reference. In the following argument, Petitioners address certain points raised in the Opposition Brief filed by Respondent Consumers.

I

CERTAIN ARGUMENTS IN CONSUMERS' OPPOSITION BRIEF ARE ERRONEOUS AND/OR MISLEADING

(A) At page 2 of its Opposition Brief, Respondent Consumers notes that the August 7, 1989 Letter Agreement entered into between the parties (Appendix "H" to Petition For Writ of

Certiorari) "was not submitted to the PSC for its review until the filing of the Application which initiated this action." However, Consumers neglects to point out that Section 11 of Act 9 [MCLA §483.111; MSA §22.1321] required Consumers to file with the MPSC a true and verified copy of that Letter Agreement within thirty (30) days after the making thereof. Consumers also neglects to point out that it did not comply with the 30-day filing requirement contained in Section 11 of Act 9, also failing to point out that, as a result of such non-compliance, Consumers was deemed to have committed an unlawful act under Section 15 of Act 9 [MCLA §483.115; MSA §22.1325], thereby rendering it liable for civil and criminal penalties.

Consumers further fails to point out that it was Consumers' own failure to file the August 7, 1989 Letter Agreement with the MPSC which was the basis of the MPSC's ruling that it did not have to give that Letter Agreement any legal effect. In other words, Consumers, by virtue of its own criminal wrongdoing in failing to file the Letter Agreement as required under the above mentioned provisions of Act 9, benefitted to the tune of millions and millions of dollars, at Petitioners' expense.[1] Of course,

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[1]As noted in the Petition For Certiorari previously filed herein, Act 9 does not grant producers a corresponding right to file an Amendment to a Gas Purchase Contract with the MPSC and seek MPSC approval thereof. Only the common purchaser may do so, and Consumers admittedly failed to do so in this case.

that fact was totally ignored by both the MPSC and Michigan Court of Appeals in their decisions below.

(B) Consumers also fails to point out that when Consumers filed its Application in MPSC Case No. U-10029, it did not seek approval of the full price provided to be paid under the Letter Agreement but, instead, sought disapproval of that price. This is acknowledged by Consumers at the bottom of page 2 of its Brief, wherein it admits that it filed an Application with the MPSC in Case No. U-10029 seeking a determination that the price increase provided for in the August 7, 1989 Letter Agreement was "unjust and unreasonable" and seeking Commission establishment of a just and reasonable price. After reaping all of the benefits of the settlement which was entered into in the summer of 1989, Consumers then sought to obtain MPSC disapproval of the very price which had induced Petitioners to enter into the settlement in the first instance and, as previously noted, the MPSC's decision to grant Consumers the relief it requested was based on Consumers' own, admitted criminal wrongdoing in failing to file the Letter Agreement and seek MPSC approval thereof.

(C) At pages 4 and 5 of its Brief, Consumers argues that, even if Section 10 of Act 9 confers a right on Consumers which it did not grant to producers, that would not remotely raise a serious equal protection issue because, since we are dealing with classic economic regulation, it is subject to rational basis scrutiny, citing City of New Orleans v Dukes, 427 US 297, 303-06 (1976). Consumers argues

that it is surely rational to conclude that the state has a greater interest in protecting the well being of public utilities whose mission is to serve the public interest than of private natural gas producers whose economic conduct is largely unregulated. This argument is erroneous, for the reasons discussed below.

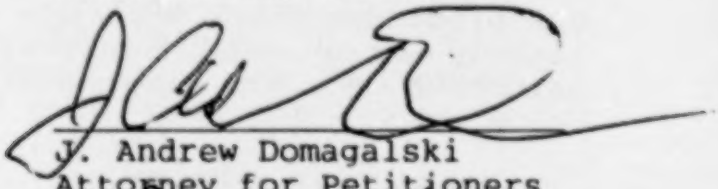
There is no "public purpose" to be served by the classification in Section 10 of Act 9 which allows a common purchaser such as Consumers to seek a gas purchase contract price decrease while not affording the gas producer a corresponding right to seek a price increase. On page 5 of its Opposition Brief, Consumers advances as the "public purpose" the protection of the well being of public utilities whose mission is to serve the public interest. This argument is misleading. The public, as well as Consumers, is protected by the Michigan Gas Cost Recovery statute [MCLA §460.6h, et seq.; MSA §22.13(6h), et seq.]. Consumers is protected because it obtains approval from the MPSC to pass along reasonable and prudent gas costs to its customers. The public is protected because, if there are any "unreasonable" gas costs, those are disallowed and may not be passed through to the public but must, instead, be borne either by Consumers' profits or its shareholders.

CONCLUSION

For the foregoing reasons and those set forth in the Petition For A Writ Of Certiorari previously filed herein, Petitioners respectfully request that

their Petition For A Writ Of Certiorari be granted.

Respectfully submitted,



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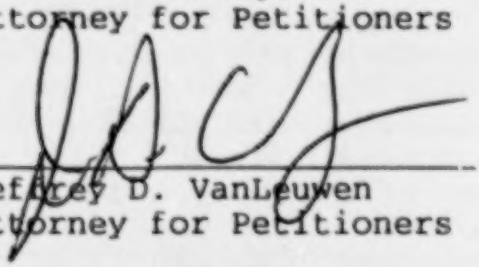

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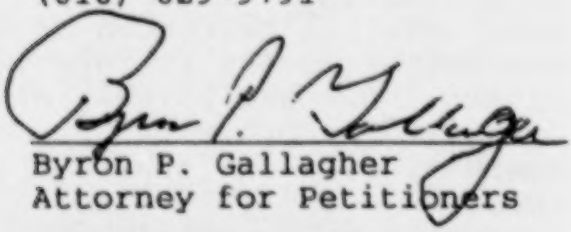

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